(1988) 04 MAD CK 0003

In the Madras High Court

Case No : O.S.A. No. 147/85

A. Paranjothi APPELLANT

Vs

Official Assignee, High Court Madras and V. Srinivasan RESPONDENT

Date of Decision : 20-04-1988

Acts Referred:

General Clauses Act, 1897 — Section 3(22)
Presidency Towns Insolvency Act, 1909 — Section 55, 7

Citation : (1989) LW(Cri) 199

Hon'ble Judges : Mohan, J;David Annoussamy, J

Bench : Division Bench

Advocate : A.R. Lakshmanan, for the Appellant; R. Krishnaswamy, for the Respondent

Judgement

Mohan, J.—The short facts leading to the appeal are as follows: An application was filed by the Official Assignee, Madras, under Ss. 7 and

55 of the Presidency Towns Insolvency Act (hereinafter referred to as "the Act") for a declaration that the transfer made by V. Srinivasan, the

second respondent in the appeal before us, is not made in good faith and there was no consideration and consequentially it must be held to be void

against the Official Assignee. The transaction was a mortgage by deposit of title deeds, popularly known as equitable mortgage, made on 24.12.82

for a sum of Rs. 6,90,000. Besides the declaration, a further prayer was made to direct the appellant herein to hand over the title deeds of the

premises bearing Door No. 25, N.S.C. Bose Road, Madras-1, to the Official Assignee. The reasons, according to the Official Assignee, for

concluding that the equitable mortgage was void inter alia are as follows:

i) The equitable mortgage dt. 24.12 82 was made on the eve of adjudication, just

54 days prior to the filing of the petition for adjudication of the

second respondent herein as insolvent.

ii) Cited the mortgage was in favour of none else than the co-brother of the mortgagor. The mortgagee (appellant herein) was fully aware of the

insolvent circumstances of the second respondent herein.

iii) The statement of the appellant before us that he gave the loan expecting repayment, since Karur Vysya Bank had sanctioned a loan of Rs.

5,00,000 to the second respondent does not appear to be true. In fact, there was no written application at all by the second respondent to Karur

Vysya Bank for the sanction of the loan, much less was there a written order sanctioning the loan.

The case of the appellant that Messrs, Vummidiar Bankers advanced a sum of Rs. 90,000 to accommodate the cheque issued by the second

respondent on Karur Vysya Bank is not borne out from the statement of account filed by the second respondent. The payment of Rs. 4,00,000 in

cash stated to have been made by the appellant does not appear to be true. No reasonable creditor would have paid such a huge sum in cash. The

registered agreement for deposit of title deeds dt. 24.12.82 recites that a sum of Rs. 6,90,000 was paid to second respondent on 20-12-82, and

that the second respondent had executed a promissory note for the said sum. This averment is not true since a total sum of Rs. 4,90,000 alone had

been paid to second respondent as on 20.12.82. It is rather strange that no promissory note came to be executed for Rs. 6,90,000. The document

of deposit of title deeds dt. 24-12-82 which is executed as collateral security for the repayment of the sum of Rs. 6,90,000 due on the promissory

note dt. 20-12-82 is invalid since no such promissory note exists. The value of the property is about 7 to 7ï¿½ lakhs of rupees. No reasonable

creditor would have lent money equivalent to the value of the property charged. On these grounds, it is urged by the Official Assignee, the first

respondent before us, that the above said transfer was made by the second respondent in collusion with the appellant with a view to screen the

property from the creditors and it was not made in good faith and for valuable consideration. Thus, the application.

The second respondent/insolvent had not filed any counter. The appellant before us, as first respondent in the original proceedings, filed a counter affidavit stating that the appellant and the second respondent married sisters. The family of the second respondent had helped the appellant

financially sometime in 1979 when the appellant was in need of money. The second respondent came to Bangalore sometime around 3rd or 4th

December, 1982 and sought the help of the 1st respondent for a loan of Rs. 90,000 stating that a cheque issued by the second respondent for that

amount sometime earlier and discounted by the Karur Vysya Bank, Sowcarpet Branch, had been dishonoured. The second respondent stated that

unless the appellant helped with the amount, his entire reputation would be dishonoured. The first respondent felt that such a large amount could

not be lent to him though he felt morally bound to help him. He also came to understand that shortly a loan of Rs. 5.00,000 would be sanctioned

by the Karur Vysya Bank and, therefore, on that basis he lent Rs. 90,000 on 7.12.82, and on further request, advanced another Rs. 4,00.000.

Representations were made not only by the Insolvent but also by the Manager of the Sowcarper Branch of Karur Vysya Bank that the loan would

be sanctioned to the insolvent. However, later, it turned out that the second respondent/insolvent bad lost his title deed and loan could not be

advanced in the absence of the original title deeds. Thus, having already parted with Rs. 4,00,000 without security, the first respondent asked for

the deposit of the copy of the sale deed with the Karur Vysya Bank and the available documents. The second respondent insisted on an advance

of another Rs. 2,00,000 for the mortgage of deposit of title deeds. It was under these circumstances, a further sum of Rs. 2,00,000 had been

advanced and the mortgagor had deposited all title deeds on 24.12 82, which was also registered later. It is not necessary that there should be a

promissory note to support the same. The Official Assignee cannot prove any collusion between the 1st and second respondents. Merely because

the accounts of the insolvent do not have these entries that does not mean the appellant should be penalised.

2. The learned Judge posed the question for consideration as follows:

Whether the transfer made by the 2nd respondent in favour of the 1st respondent (appellant before us) of the premises bearing No. 25, N.S.C.

Bose Road, Madras-1, by way of equitable mortgage by an agreement of deposit of title deeds, dt. 24 12.82, for Rs. 6,90,000 was not made in good faith and for valuable consideration and therefore void as against the Official Assignee?

3. On consideration of the entire materials before the learned Judge, he concluded that Ex.B11, the document under dispute, in and by which the

equitable mortgage was effected on 24-12-82, was true and fully supported by consideration. After so holding, he proceeded to consider whether

Ex.B11 was taken by the appellant in good faith. On consideration of the entire case laws and on application of those principles, he was of the

view that when Ex.B11 was brought into existence, the appellant before us was fully aware of the insolvent circumstances of the second

respondent and as such the equitable mortgage cannot be said to have been brought about by good faith. Consequently, it was held to be not,

binding on the Official Assignee. The logical result was the appellant before us was directed to return the title deeds in respect of Ex.B15 to B18 as

prayed for by the Official Assignee. On the application thus being allowed, the aggrieved appellant has preferred the present appeal.

4. The learned advocate General appearing for the appellant would strongly urge that in order to prove lack of good faith on the part of the

appellant, the following ingredients must be necessary.

i) There must be collusion between the mortgagor and the mortgagee viz. second respondent/insolvent and the appellant,

ii) No consideration had actually passed, and

iii) The transaction was with a view to screen the property in order to defeat or delay the just claims of the creditors.

Of course, this is not a case of mortgage to cover up past transactions. The statement filed by the insolvent before the Official Assignee clearly

shows that payments out of loan were made not to unduly favour certain creditors. In other words, it is not the case of the Official Assignee that

the money was kept apart to defeat or delay the other creditors among the body of creditors. These circumstances, according to the learned

Advocate General, are enough to establish good faith. The evidence also supports that position. Reference is made to Mulla''s Law of Insolvency

in India, 1977, 3rd Edition, pages 510 and 520 and it is contended that the onus is on the Official Assignee and he had not chosen to discharge the

case. Merely because the transfer is made in favour of a co-brother, it does not mean ipso facto that the transaction is void, nor is the Official

Assignee relieved of the onus. In support of this, the decision in Official Assignee v. Khoo Saw Cheow 32 L.W. 574=A.I.R. 1930 P.C. 265, is

cited. As to what is the meaning of ''good faith'', can be called out from the decision in Kailas Sizing Works Vs. Municipality of Bhivandi and

Nizampur, The evidence in this case clearly discloses that, it is on the strength of the representations made by the insolvent and the Manager of the

Bank, that the appellant was obliged to part with the loan Rs. 4,00,000. If both of them had played a fraud on the appellant that does not mean

that there is lack of good faith on the part of the appellant, nor will that have any relevance as far as assessment of lack of good faith on the part of

the appellant is concerned.

5. Mr. R. Krishnaswamy, learned counsel appearing for the first respondent/ Official Assignee, would draw our attention to paragraphs 4 and 5 of

the counter filed by the appellant during the original proceedings, wherein it was categorically stated that even as early as on 9.12.82, the appellant

was fully aware about the loan of title deeds by the second respondent. While his evidence discloses that he was made fully aware that the Karur

Vysya Bank was not likely to sanction the loan, if he advanced further loan, that is clear manifestation of lack of good faith. Then again, paragraph

5 of the counter clearly points out that it was in good faith and on the assurance of the Bank Manager and as the representation of the insolvent

second respondent, the appellant advanced Rs. 4,00,000, the appellant was made aware of the real situation. Besides these, when he advanced a

further sum of Rs. 2,00,000 he states it was to enable him to secure some document to secure the loan, by way of mortgage by deposit of title

deeds. This was done at the time, as his own admission discloses, when he was aware of the insolvent circumstances of the insolvent/second

respondents. The learned Judge, on a careful analysis of the evidence, had come to the conclusion that there is totally lack of good faith. Of course,

the decision in Kailas Sizing Works Vs. Municipality of Bhivandi and Nizampur, lays as to what exactly is the meaning of ''good faith'', but that

does not advance the case of the appellant. As regards the decision of the Privy Council in Official Assignee v. Khoo Saw Cheow 32 L.W. 574=

AIR 1930 P.C. 265, the question of onus pales into insignificance if the entire evidence is before Court. Even otherwise, it cannot be said that the

Official Assignee has in any manner failed to discharge the onus.

6. Having regard to the above arguments, the only question that arises for consideration is whether Ex.B11 was effected by the second respondent

in good faith.

7. We are going into the finding in relation to consideration because that has been found in favour of the appellant. As to the meaning of ''good

faith'', rightly, the attention of the learned judge was drawn to S. 3 (22) of the Indian General Clauses Act, 1897, which reads as under:

A thing shall be deemed to have been done in ''good faith, where it is in fact done honestly, whether it is done negligently or not.

S.3 (II) of the Madras General Clauses, 1891, defines ''good faith'' as follows:

Nothing is said to be done or believed in good faith which is done or believed without due care and attention..

The very ruling relied on by the learned Advocate Geneial viz. Kailas Sizing Works Vs. Municipality of Bhivandi and Nizampur, , makes the

position clear as to what would constitute ''good faith'', which is dealt with in Paragraph 14. As rightly held by the learned single Judge, the

Supreme Court had occasion to point out in Subramania Iyer v. Official Receiver, Quilon 1958 S.C.J. 172 at Page 184, as follows:-

Annulment proceedings are aimed at transactions between a debtor who has become insolvent and a creditor who, knowing the true state of the

debtor''s crashing business, has taken undue advantage of the embarrassed financial position of the debtor.

If really the law is that the test of good faith is appropriate to proceedings under the insolvency law viz., honestly whether negligently or not, it is in

that view, the matter will have to be examined. The two major items of loan viz. Rs. 4,00,000 and Rs. 2,00,000, could not by any stitch of

imagination be said to have been advanced by the appellant in good faith.

8. First and foremost, we will take up the evidence of the appellant about Rs. 4,00,000, which is as under:

Q. You have paid that amount of Rs. 4,00,000 which was asked for on 19th by the second respondent on 20th December, 1982.

A. On 19th, I told Mr. Srinivasan, the second respondent that I was not in a position to pay the money immediately from the turnover in the shop.

He gave me pressure saying that he would be getting the loan in a couple of days and that I may take that amount. Thereafter, I rang up to the

Bank Manager, Mr. Sundaresan, and informed him that I had already lent Rs. 90,000 to Mr. Srinivasan and Mr. Srinivasan was again asking me a

further sum of Rs. 4,00,000 and whether I should pay the amount or not Then the Manager told me that loan of Rs. 5,00,000 had been sanctioned

to Mr. Srinivasan and before the loan was disbursed to Mr. Srinivasan, he will be informing me to take back the amount from out of that loan.

Then on 20th I told. Mr. Srinivasan that I would give a DD. But Mr. Srinivasan told me that if a D.D. is given and the amount is credited in the

bank, the other creditors will take away the amount and because he was having pressing debts, he wanted me to pay the amount in cash.

Thereafter, I paid the amount of Rs. 4,00,000 in cash and made an entry in the day book and obtained the signature of Mr. Srinivasan Exhibit R.1

(B) is the entry for the same at page 159 of Exhibit R1. I also got a stamped receipt for Rs. 4,00,000 and also a promissory note for the said

amount on the same day from Mr. Srinivasan. Exhibit R3 and R4 are the receipt and the promissory note respectively signed by the second

respondent Mr. Srinivasan. This is clearly false, because this evidence is not supported by the Manager of the Bank, who has taken a categoric

stand as follows:

Q. Do you know the lending of a sum of Rs.4 lakhs by Paranjothi to Srinivasan?

A. Subsequently, on my return from Karur, I could not remember the exact time-Paranjothi asked me whether Srinivasan got the loan. Then I told

that the party expressed his inability to produce the title deeds. Unless they are produced, the loan cannot be sanctioned. At that time, he informed

me that there was a demand from Srinivasan to make a loan of Rs. 4 lakhs. But I am not aware exactly. But Paranjothi expressed his inability to

pay that amount.

As between these two statements we cannot give any credence to the testimony of the appellant because he was fully aware that the Bank was not

advancing any loan. It is in this connection, paragraph 4 of the counter statement filed by the appellant herein becomes very relevant and it is

extracted hereunder:

At my insistence, the second respondent and the Branch Manager left Bangalore by my car to Karur on the same day, i.e., on 7.12.1982 to

confirm the sanction of the loan. My car was sent back from Karur on 8th itself and I was informed on 7th morning by the Branch Manager from

Madras that there was some delay in the official sanction of the loan by the Bank as the 2nd insolvent did not produce the original sale deed of the

property No. 25, N.S.C. Bose Road stating that he had mislaid it and would deposit the same shortly thereafter after locating it. I was expecting to

hear from the second insolvent of his actually locating the original sale deed and depositing the same in the Bank from 9th morning till 20th

December, 1982.

It is further stated by the appellant in paragraph 5 as follows:

Believing in good faith in the assurance of the Bank Manager and also the representation of the second insolvent, I paid the Rs. 4,00,000 on

20.12.82 in cash from my business."" Therefore, if really, as early on 9.12.82 the appellant was aware of the loss of the title deeds and the Bank

Manager had told him that there was no possibility of advancing loan without the deposit of the original title deeds, yet, if he chooses to advance

loans, does it not mean lack of good faith? It is in this connection, we want to lay stress upon the negative aspect of proof viz. lack of ''good faith''

which alone law insists, and not ''bad faith'' which is a positive aspect. No person would ever advance a loan of Rs. 4,00,000 when it was made

clear to him that no loan was likely to be advanced by the bank.

9. As regards the loan of Rs. 2,00,000, the positive case of the appellant is, as the evidence discloses, that because already Rs. 4,90,000 had

been advanced, in order that he could secure it by means of a document, further Rs. 2,00,000 came to be advanced on demand. This is just trying

to make a virtue of a difficult situation. We are unable to think that any lender would ever advance a further sum of Rs. 2,00,000 under these

circumstances, especially when the appellant knew the position of the insolvent. His knowledge about the insolvent''s position can be gathered from

his own admission which is produced hereunder:

In your examination in chief you said that Srinivasan told you that if you pay by D.D. his creditors would take away the money and that is why he

demanded cash?

A. Srinivasan told me that he had pressurised dues from outside and therefore he wanted cash.

Q. You know on that day that he was under great pressure?

A. Yes. I know.

Q. You also know that he was not able to pay money towards fixed deposits which were maturing in the business of Vummidiar Bankers and

Vummidiar Sarathy Jewellers?

A. I do not know about the transactions in Vummudiars Bankers and Vummudiar Sarathy Jewellers.

This is besides the admission of the appellant that Srinivasan told him that if a D.D. was given, the other creditors will take away the amount and

because he was having pressing debts he wanted to pay the amount in cash. If so much had been brought out in evidence, the argument of the

learned Advocate General that the present mortgage is not to cover the past transaction is neither here nor there. Equally, we are unable to accept

the argument that the loans advanced to the tune of Rs. 6,90,000 had gone towards the discharge of the fixed deposits which had matured or

towards the interest on fixed deposits, as it cannot in any manner help the appellant, because what we are concerned in this case is whether there

was lack of good faith on the part of the appellant. That, we find so clearly, because it is somewhat surprising as to the reason for not taking a

promissory note for Rs. 90,000, being a bank transaction, and again why the promissory note was taken only for Rs. 4,90,000 as on 20.12.82

and the other amount remained uncovered till the execution of the mortgage by deposit of title deeds. Ex.R11. These are matters which throw a

good deal of suspicion pointing out to the conclusion of lack of good faith. Law is very clear that in deciding the element of lack of good faith, the

entire surrounding circumstances will have to be taken note of. Therefore, this is not a case in which it could be said that the Official Assignee has

not discharged his onus. No doubt the Privy Council in Official Assignee v. Khoo Saw Cheow 32 L.W. 574=A.I.R. 1930 P.C. 265, held as

follows:

The fact that the wrong party was called upon to begin, taken along, might not be sufficient ground for a new trial, but it is so if the trial Judge takes

an erroneous view as to the law in regard to onus and his mind is coloured by that view, thereby disabling him from weighing the evidence evenly.

But it is not merely because of the relationship we hold there is lack of good faith, but an overall assessment of the evidence. In this connection, it

will be apt to quote the following statement of law, occurring at page 523 of Mulla''s. The Law of Insolvency in India Third edition, 1977,

615: Onus of proving good faith and consideration: It was held in a number of cases that the burden of proving consideration and good faith lies on

the purchaser or incumbrancer but these cases are no longer good law in view of the Privy Council decision where it was held that the burden lies

on the Official Assignee or Receiver to prove that there was neither good faith nor consideration. But where detailed allegations are made in the

plaint and some of these are admitted, the onus may be shifted. But where, notwithstanding the pleadings, the Receiver at the trial confines his case

to the fraudulent preference, he cannot be allowed in appeal to adduce evidence as to the inadequacy of the price. It will not be sufficient for the

receiver, in discharging the onus laid on him, merely to point to suspicious circumstances; he must satisfactorily establish the facts he alleges.

What has to be proved is not the absence of good faith on the part of the insolvent transferor, but the absence of good faith on the part of the

transferee. Therefore, looked at from this point of view, it matters very little as to how the loans secured were spent by the insolvent. It is also

worthwhile noting that not one of the loans secured by the insolvent is reflected in his accounts. As stated by the learned counsel for the Official

Assignee, in the personal schedule of the insolvent, he categorically states that no personal accounts are maintained by him. This is yet another

circumstance pointing to the same conclusion, as stated above. Thus, we are in entire agreement with the learned single Judge. We have no

hesitation, therefore, in dismissing the appeal.

In the result, the appeal is dismissed with costs. Counsel fee Rs. 1000, to be paid to the Official Assignee.

